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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1974

No. 73-1988

TEXAS CITY DIKE & MARINA, INC.,
Petitioner

vs.

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth District is reported at 492 F.2d 1115. The decision of the United States District Court for the Southern District of Texas, Galveston Division, is not yet officially reported, but appears at 21 WH Cases 4 and 71 CCH Labor Cases ¶32,882. The Opinion of the Fifth Circuit Court of Appeals is reprinted herein as Apendix A, the Decision of the District Court is reprinted herein as Appendix B.

JURISDICTION

The opinion of the court below was entered April 19, 1974. Petitioner's Petition for Rehearing and Rehearing En Banc was denied May 17, 1974. This Petition is being filed within ninety days of the entry of the judgment of the United States Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

The jurisdiction of the United States Court of Appeals for the Fifth Circuit and the District Court was based upon 28 U.S.C. §§1291, 1331 and 1337.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in adopting and applying a "sales" test to determine the applicability of the exemption provided in Section 13(a)(3) of the Fair Labor Standards Act, as amended, hereinafter referred to as the "Act," where such test is not contained in Section 13(a)(3), its legislative history, the regulations promulgated pursuant to the Act, the Opinion Letters of the Wage-Hour Administrator, nor elsewhere, and further in holding the exemption inapplicable because Petitioner did not own the Gulf of Mexico upon which its business was located.

2. Whether the Fifth Circuit erred in failing to apply the "clearly erroneous" standard to the District Court's findings of fact and in holding as a matter of law that the District Court must enter an injunction against Petitioner on remand.

3. Whether, assuming the validity of the Fifth Circuit's "sales" test, the application of the test to Peti-

tioner constitutes a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution since such test was heretofore unknown and unannounced before its application to Petitioner.

STATUTORY PROVISIONS INVOLVED

Section 13(a)(3) of the Fair Labor Standards Act of 1938, *as amended* [29 U.S.C. §§201 *et. seq.*], provides:

> ["The provisions of Section 6 . . . and 7 shall not apply with respect to—] any employe employed by an establishment which is an amusement or recreational establishment, if . . . during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ percentum of its average receipts for the other six months of such year."

The Administrator of the Wage and Hour Division of the U. S. Department of Labor has issued no regulations or interpretative bulletins concerning the exemption provided by Section 13(a)(3) of the Act. The Opinion Letters of the Administrator of the Wage and Hour Division of the U. S. Department of Labor concerning Section 13(a)(3) of the Act are reprinted herein as Appendix C.

STATEMENT OF THE CASE

This was an action brought by Respondent (Plaintiff), the Secretary of Labor, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938, as amended, hereinafter referred to as the "Act," to enjoin Petitioner from violating the minimum wage, over-time, child labor and record

keeping provisions of the Act. Petitioner and Respondent entered into a stipulation of facts upon which the District Court entered its decision without further testimony. Respondent stipulated that Defendant met all the specific qualifications for the exemption set forth in Section 13(a)(3) of the Act of 1970, if Defendant's marina was an "amusement or recreational establishment" within the meaning of that Section.

It was further stipulated that Petitioner was engaged in operating a marina located on the Gulf of Mexico at the Texas City, Texas Dike. This marina provided the general public with the means and facilities necessary to the pursuit of recreational sport boating and fishing. The parties stipulated as follows:

> It is stipulated that Defendant operated a marina at the Texas City, Texas Dike where it provided boating services to the general public including the storage, repair and maintenance of boats utilized by Defendant's customers in recreational pursuits; that Defendant also had boats and motors available for rental to persons desiring same for recreational pursuits such as fishing; that Defendant also made fish bait available for purchase; that Defendant also made groceries available for persons desiring food or drink in connection with their recreational pursuits; and that Defendant provided dock facilities for use in mooring boats, lifting boats out of the water and lowering boats into the water. Defendant also sold boats for recreational purposes, but no employee for whom back wages are sought was engaged in this activity. It is further stipulated that all boats using Defendant's facility were used in recreational and not commercial pursuits. (Paragraph VI, K, pp. 5-6, Pre-Trial Order before District Court).

Based upon the stipulated facts, the District Court determined that Defendant's marina was an "amusement or recreational establishment" and that Section 13(a)(3) of the Act was applicable to Defendant's operations during 1970. The Court of Appeals for the Fifth Circuit reversed the decision of the District Court on the basis of a theretofore unannounced "sales" test. Specifically, the court held that to qualify as a recreational or amusement establishment, an establishment must derive 50% of its income from sales of "recreational services and goods" without explaining which sales qualify as sales of "recreational services and goods." This sales test is to be measured, evidently, by the year's sales *following* the year upon which the establishment determines the availability of the exemption based upon the seasonality test specifically set forth in Section 13(a)(3). The court remanded the case to the District Court with directions that it enter an appropriate injunction against Petitioner.

REASONS FOR GRANTING WRIT

I.

THE APPLICATION OF THE NEW "SALES" TEST IS ERRONEOUS AND DEFEATS THE EXPRESSED INTENT OF CONGRESS.

Section 13(a)(3) of the Act had its genesis in the 1966 amendments to the Act. Prior to these amendments, exemption was provided for recreational and amusement establishments in subsection (b) of Section 13(a)(2). When Congress reduced the dollar volume and scope of that Section, it removed the recreational and amusement subsection and set it up as a separate

exemption and provided, *without reference to dollar volume or character of sales*, that the availability of the exemption was to be determined by the seasonality of the operation. It was stipulated that Petitioner met the seasonality test of the Section.[1]

As noted by the Fifth Circuit in its Opinion, the House of Representatives Committee Report listed as an example of the exempt activities under Section 13(a)(3), "sport boating or fishing." H. R. Rep. No. 871, 89th Cong., 1st Sess. 35 (1965). The specific inclusion of these activities in the legislative history of the Section means, it is submited, that the activities of Petitioner in question here are specifically covered by the exemption. What other establishment engaged in these activities could have been intended? It is clear that Petitioner's establishment is the only establishment that would fall within the intent of Congress. The

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[1] The Fifth Circuit applied against Petitioner not only the applicable provisions of Section 13(a)(3) of the Act but also the irrelevant provisions of Section 13(a)(2) of the Act. The court, early in its opinion recognized the lack of any statutory scheme or carefully worked out pattern in the Act's exemptions. Later in the opinion, however, the court seized upon the existence of an exemption in Section 13(a)(2) as a basis for disqualifying Petitioner from the Section 13(a)(3) exemption. Such action is clearly contrary to the Act. Interposition of the tight restrictions of the Section 13(a)(2) exemption onto Section 13(a)(3) is not warranted and would, it is submitted, likely defeat the admitted availability of the Section 13(a)(3) exemption to the souvenir stand in the national park or the golf course pro shop. Why then should Section 13(a)(2) defeat the applicability of Section 13(a)(3) to Petitioner, especially in view of the fact that Congress in the 1966 amendments clearly and carefully removed what is now Section 13(a)(3) from Section 13(a)(2), making it a separate and distinct exemption?

services and facilities of Petitioner are directly related and necessary to the enjoyment and use of the Gulf of Mexico for the recreational pursuits of sport boating and fishing. The decision of the Fifth Circuit frustrates the stated intent of Congress.

As the court acknowledged, Section 13(a)(3) of the Act contains only two requirements — an establishment must be (1) seasonal and (2) recreational. In ruling the exemption inapplicable, the court added a new test which requires that the "principal activity" of the establishment be recreational as measured by a percentage of sales. Such a requirement is not contained in the Act, the regulations or Opinion Letters of the Wage-Hour Administrator.

In adopting its "sales" test to determine the principal activity of an establishment, the court ignored the clear congressional intent that the coverage of the exemption is to be determined by the *character* of the business being questioned. Here, the character of Petitioner's activities under challenge are, as noted above, clearly within the scope and intent of the exemption.

The Fifth Circuit's "sales" test calls for determination of the principal activity of the Petitioner by application of an income test, rather than by an evaluation and determination of the character of the activities in question. Such test apparently requires that more than fifty percent of Petitioner's income be derived from recreational sources (although all of Petitioner's income was stipulated to be recreational in character and nature), but no delineation of what other sales (both of goods and services) and which of them would qualify is indicated. The net effect is that the test rejects the

stipulation of the parties and fails to define what sales are recreational and what sales are not recreational.

The court's test is likewise inconsistent with the seasonality test set out in the Act. It is applied based on 1970 sales rather than on sales made in the preceding calendar year upon which the entitlement to the exemption is predicated by the express wording of the Act. The test as applied in this case will make it impossible for an establishment to know whether or not it is exempt until it receives its final sales figures for a year — one year after it, in accordance with the Act's seasonality test, determines its qualification for the exemption. If the Fifth circuit's "sales test" is to be the criterion, rather than the character and nature of the activities in question, it is submitted that the administration of the Act and the process of justice is far better served by applying this test to the sales figures for the preceding calendar year — the same year the Act specifies for applying the seasonality test. The Fifth Circuit's failure to do so is clear error and, unless corrected, will create substantial mischief and uncertainty in the administration of the Act as well as rendering an establishment's compliance with the Act a matter incapable of determination until after the fact.

Moreover, in *Brennan v. Six Flags Over Georgia, Ltd.*, 474 F.2d 18 (5th Cir. 1973), *cert. denied*, 414 U.S. 827 (1973), the Fifth Circuit held that the exemption did not apply to certain employees because such employees were not engaged in amusement or recreational pursuits. The court there stated, "It is the *character of the work, not the source of remuneration, that controls.*" 474 F.2d at 19 (emphasis added). In the case at bar, it was stipulated that absolutely no employee for whom

back wages were sought was engaged in boat sales. If boat sales are not considered recreational, then none of the employees involved in this action were engaged in the disqualifying activity. If it is the character of the activity in which the employees engage that is determinative, as indicated in *Brennan v. Six Flags Over Georgia, supra,* then Petitioner is clearly entitled to the 13(a)(3) exemption.

The Fifth Circuit's opinion, when analyzed, apparently also stands for the proposition that, since Petitioner is not an amusement or recreational establishment, it cannot be an amusement or recreational establishment. The circuity of this reasoning is apparent. Yet this is the reasoning relied upon by the court to distinguish petitioner from other establishments found exempt under Section 13(a)(3) by the Administrator of the Wage and Hour Division of the United States Department of Labor in his Opinion Letters, reprinted herein as Appendix C. The court finds that establishments such as "pro shops at golf courses and drygoods stores in national parks" are exempt because of their integral relationship with "a supervised, geographically delimited recreational area or 'establishment.'" Although this distinction may sound reasonable at first blush, upon further reflection one can see that this distinction is not, in fact, helpful and leads to absurd results.

For example, despite Petitioner's integral relationship to and location upon the Gulf of Mexico, upon which Plaintiff claims the only recreation occurs, the court finds such relationship to be insufficient since the Gulf of Mexico is under no one's ownership, management or supervision and has not been set aside for recreational use. This is contrasted to the situation

of a souvenir stand in a national park where the park is under the supervision of the park service and is set aside for recreational purposes. But, carrying that distinction a little further, what about the same souvenir stand located not in a national park but in a national forest (an area set aside not primarily for recreation but to preserve forests)? Does this distinction then mean that the formerly exempt souvenir stand loses its exemption when placed in a national forest because of the different purpose of its geographical location.

To carry the problem further, from the court's opinion one could logically expect that a marina located on a public lake would not be exempt, but would the location of the lake in a state park change that result? If a marina owns its own lake, would that change the result? The mischief in this test is obvious. The problem, it is submited, is that the asserted distinction is itself irrelevant. The ownership, supervision or management of the recreational area is irrelevant. The fact that an area may be used for purposes other than recreation is likewise irrelevant. It is the establishment that is seeking the exemption, and it is the character of the activities of the establishment upon which the exemption should depend.

This Court is respectfully urged to review the Fifth Circuit's new "interpretation" of the Act in view of (1) the substantial, potential problems presented in the administration of the Act, (2) the lack of any ascertainable standards by which those subject to the Act can be guided, (3) the departure from the Act's intent, as specified in its legislative history, and (4) the failure to consider the character of the enterprise's activities in question as required by the Act, substituting an arbi-

trary test which cannot be determined by the establishment *or* the Wage-Hour Administrator until one year after the exemption was thought to apply.

II.

THE FAILURE OF THE COURT OF APPEALS TO APPLY THE "CLEARLY ERRONEOUS" STANDARD TO THE DISTRICT COURT'S FINDINGS OF FACTS, AND ITS HOLDING THAT THE DISTRICT COURT MUST ENTER AN INJUNCTION AS A MATTER OF LAW WERE ERROR.

The decision of the District Court was based upon a question of fact — whether Petitioner was a "recreational or amusement establishment." Even if this question be considered a mixed question of fact and law such as the question of what is a "gift" within the meaning of the Internal Revenue Code as presented in *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 289-91 (1960), the clearly erroneous rule applies. In that case, as here, defining the statutory term required the application of human experience. Hence, the correct standard for review of the District Court's decision is the clearly erroneous rule. *Commissioner of Internal Revenue v. Duberstein, supra; Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669-70 (5th Cir. 1968). That this case was tried on stipulated facts does not alter the applicability of the clearly erroneous rule. *United States v. United Gypsum Co.*, 333 U.S. 364, 394-395 (1948); *United States v. Stringfellow*, 414 F.2d 696, 699 (5th Cir. 1969); *Sicula Oceanica, S.A. v. Wilmar Engineering & Sales Corp.*, 413 F.2d 1332, 1333-34 (5th Cir. 1969); 9 Wright & Miller, Federal Practice and Procedure §2587 at 747 (1973).

The Fifth Circuit departed from this standard under the guise of finding an improper legal standard had been applied. In fact, however, the District Court judged the character of Petitioner's business on the facts and found the exemption applicable. It was only on appeal that Respondent raised a "sales" test, and, it is submitted, even considering this test, the District Court's judgment as to the character of Petitioner's activities was not clearly erroneous under the stipulated facts. Reversal under these circumstances by the Fifth Circuit was improper and constitutes a substantial and serious departure from the proper role of an appellate court, warranting and requiring intervention by this Court.

Moreover, the Fifth Circuit reversed the decision below and remanded the case to the trial court "to issue an appropriate injunction and award back pay for the year 1970." However, the same court in *Wirtz v. B. B. Saxon Co.*, 365 F.2d 457, 462 (5th Cir. 1966), said, "There can be no question that the issuance of an injunction is a matter within the sound discretion of the trial judge." *Accord: Shultz v. Parke*, 413 F.2d 1364, 1368 (5th Cir. 1969); *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). While the court may appropriately require the entry of an injunction compelling the restitution of wages, *Shultz v. Parke, supra* at 1370, the granting of an injunction as to future violations is a matter within the sound discretion of the District Court. In this case there are strong considerations indicating that no injunction should be entered. Considering the clear statutory language, the Opinion Letters of the Wage-Hour Administrator, and the lack of regulations or interpretative bulletins issued by the Administrator, it is submitted that Petitioner was entitled to rely on such

pronouncements and consider itself exempt pursuant to Sections 10 and 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. §§260, 261, and, considering the stipulated fact that Petitioner has not violated the Act since August 1971, the District Court should properly rule that injunctive relief against future violations was not necessary.

III.

THE APPLICATION OF THE NEW "SALES" TEST TO PETITIONER DENIES PETITIONER DUE PROCESS OF LAW

The "sales" test of the court holds an establishment must have more than 50% of its gross sales constitute "qualified" sales during the year that the exemption is claimed. On the basis of its newly enunciated test, the court concluded that Petitioner, despite the legislative history and clear intent of the exemption, did not qualify for the Section 13(a)(3) exemption. Laying aside the cumbersome and confusing nature of this test, the total failure to explain what sales qualify, and the fact that it ignores the character of the activity in question, there is no support for this test in the Act, its legislative history, any regulations issued pursuant to the Act by the Secretary of Labor, or in any of the Opinion Letters issued by the Wage-Hour Administrator (reprinted as Appendix C herein). This test, if appropriate at all, should have been developed through rule making procedures of the Department of Labor. Certainly there is no way Petitioner could have had any notice of such a requirement prior to its reading of Respondent's Brief to the Fifth Circuit Court of Appeals, since this was the first time this test was assert-

ed or suggested to be an appropriate test under Section 13(a)(3) of the Act.

If this new test is to be adopted and applied, it is submitted that due process of law requires that it be clearly defined. The appropriate procedure is to do so through publication in the Federal Register as part of the rule making process. It is submitted that the adoption of a rule, which this test constitutes, without following the appropriate rule making procedure, violates not only the Administrative Procedure Act, 5 U.S.C. §553(b), (c), but also, when applied to Petitioner, without prior notice and without an opportunity to participate in the rule making, constitutes a denial of due process of law to Petitioner. *Storer Broadcasting Co. v. United States*, 220 F.2d 204 (D.C. Cir. 1955), *rev'd. on other grounds*, 351 U.S. 192 (1956); *Wilson v. F.C.C.*, 170 F.2d 793 (D. C. Cir. 1948); *see Morgan v. United States*, 304 U.S. 1 (1938). Such denial of due process is compounded by the failure of respondents even to propose or present the test until this case reached the appellate court. This delayed announcement of the rule comes too late to comport with the procedural fairness required by the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

This case presents for the first time the definition of "amusement or recreational establishment" within the meaning of Section 13(a)(3) of the Act. The District Court resorted to common usage and found Petitioner within the definition of an "amusement or recreational establishment" consistent with the legislative history of Section 13(a)(3) of the Act. The Fifth Circuit, on the other hand, rejected common usage and the legislative history and established a new test for qualification for the exemption. The Fifth Circuit's approach is unsupportable as a matter of law. Moreover, the administration of the Act is jeopardized due to the doubt and confusion created by the Fifth Circuit's opinion as to the applicability of the Section 13(a)(3) exemption. This Court should provide guidance in this area.

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



By
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CERTIFICATE OF SERVICE

I, A. J. Harper II, Attorney for Texas City Dike & Marina, Inc., do hereby certify that on this the 3rd day of July, 1974, copies of the foregoing Petition for Writ of Certiorari have been served on the following:

William J. Kilberg
Carin Ann Clauss
Jacob I. Karro
James B. Leonard
United States Department of Labor
Office of the Solicitor
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George T. Avery
Regional Solicitor
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Dallas, Texas 75202

Solicitor General
Department of Justice
Washington, D.C. 20530

Attorneys of record for Respondents, by mailing the same to them through the United States mail, postage prepaid.

A. J. Harper II

A. J. HARPER II

APPENDIX A

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

TEXAS CITY DIKE & MARINA, INC.,

Defendant-Appellee.

No. 73-2232.

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.**

APRIL 19, 1974

Appeal from the United States District Court for the Southern District of Texas.

Before BELL, THORNBERRY and DYER, Circuit Judges.

THORNBERRY, Circuit Judge:

The sole question presented for review is whether appellee's marina is an "amusement or recreational establishment" within the meaning of 29 U.S.C.A. §213 (a)(3) and thus exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act.[1]

[1] Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201-219 (1964), as amended, (Supp. 1973).

The court below held that appellee was entitled to the exemption. We disagree and therefore reverse.

I.

The parties have stipulated to the relevant facts. Appellee Texas City Dike & Marina, Inc. owns a marina that dispenses goods and services to people pursuing the leisure time activities of boating and fishing. Located on the shores of the Gulf of Mexico in Texas City, Texas, the marina stores, repairs, and maintains recreational boats; sells boats, motors, trailers, gasoline, and oil; rents boats and motors; provides dockside facilities for launching and retrieving boats; and sublets space for a grocery store and a bait stand. In the year in question, 1970,[2] the marina derived fifty-seven percent of its income from selling boats, motors, and trailers.[3]

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[2] The Secretary of Labor apparently sought back pay for the years 1970 and 1971. Appellee could not avail itself of the amusement exemption for the year 1971, for the marina's 1971 receipts and operating schedule did not meet the seasonality requirement of 29 U.S.C.A. §213(a)(3) (Supp. 1973). The parties agree that the marina's operation did meet the seasonality test in 1970.

[3] The parties stipulated to the following description of the marina's 1970 income.

Boats, motors and trailer sales	$244,977.00
Petroleum products	31,032.00
Bait	7,883.00
Shop parts	44,045.00
Shop labor	26,527.00
Boat storage	41,669.00
Boat and motor rentals	11,291.00
Fork lift fees	14,173.00
Grocery stand sublet	767.00
Miscellaneous	1,881.00
Bait stand sublet	2,365.00

The parties agree that the marina is an "enterprise engaged in commerce"[4] as defined by the FLSA and therefore is subject to the Act's strictures unless it is eligible for an amusement-recreation exemption under section 213(a)(3). Convinced that the exemption is unavailable, the Secretary seeks $4,668.72 in back wages and an injunction against future violations of the Act's minimum wage, overtime, child labor and recordkeeping requirements. In his view the exemption is unavailable because the marina's principal activity is selling recreational equipment, not providing recreation.

Appellee Texas City Dike & Marina denies that the marina's principal activity is selling recreational equipment; its principal activity is providing "the means for recreational boating and fishing in and on the Gulf of Mexico." Appellee contends it is misleading to determine the marina's principal activity by using an income analysis, as the Secretary has done. Since its principal activity is providing recreational means and facilities, it is entitled to a recreational exemption under section 213(a)(3).

II.

If there is any unifying principle underlying the exemptions in the FLSA, it is not evident in the Act's words or its legislative history. Reading the Act's legislative history and its exemptions leads one to conclude that the exemptions were created simply to ensure the Act's passage. Without the exemptions, the Act's opponents may have prevailed. *See* 107 Cong. Rec. 7102-5 (1961) (Remarks of Senators Holland and Dirksen);

[4] 29 U.S.C.A. §203(s) (Supp. 1973), amending 29 U.S.C.A. §203(s) (1964).

Comment, Scope of Coverage Under the Fair Labor Standards Act of 1938, 30 Wash. & Lee L.Rev. 149, 156 (1973). The absence of a unifying principle makes the exemptions' interpretation a difficult task.

[1, 2] The ground rules for interpreting and applying FLSA exemptions disfavor the employer. The Supreme Court has said:

> To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and frustrate the announced will of the people.

A. H. Phillips, Inc. v. Walling, 1945, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095. *See* Hodgson v. Colonnades, Inc., 5th Cir. 1973, 472 F.2d 42. Therefore we must construe exemptions narrowly against the employer seeking to assert them. Arnold v. Ben Kanowsky, Inc., 1960, 361 U.S. 388, 80 S.Ct. 453, 4 L.Ed.2d 393; Mitchell v. Kentucky Finance Co., 1959, 359 U.S. 290, 79 S.Ct. 756, 3 L.Ed.2d 815; A. H. Phillips, Inc., v. Walling, *supra*. The employer has the burden of proof to show that he is entitled to an exemption. Idaho Sheet Metal Works, Inc. v. Wirtz, 1966, 383 U.S. 190, 86 S.Ct. 737, 15 L.Ed.2d 694; Arnold v. Ben Kanowsky, Inc., *supra*.

III.

With the burden of proof and manner of construction in mind, we turn now to the exemption that appellee asserts.

> The provisions of section 206 [minimum wages] . . . and section 207 [maximum hours] of this title shall not apply with respect to —

> (3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-⅓ per centum of its average receipts for the other six months of such year; . . . .

29 U.S.C.A. §213(a)(3) (Supp. 1973). The exemption contains two requirements. The establishment must be (1) seasonal and (2) recreational. Appellee's marina unquestionably satisfied the seasonality requirements in 1970. *See* note 2, *supra*. The only issue is whether the marina is an "amusement or recreational establishment," a term whose definition has not been judicially explored.[5]

In interpreting and applying the exemption, our starting point will be its legislative history. Although it is skimpy, it suggests that the exemption does not cover establishments whose sole or primary activity is selling goods.[6] For example, the amusement-recreation exemp-

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[5] *Cf.* Brennan v. Yellowstone Park Lines, 10th Cir. 1973, 478 F.2d 285, cert. denied, 414 U.S. 909, 94 S.Ct. 228, 38 L.Ed.2d 147; Brennan v. Six Flags Over Georgia, Ltd., 5th Cir. 1973, 474 F.2d 18, cert. denied, 414 U.S. 827, 94 S.Ct. 47, 38 L.Ed.2d 61; Wirtz v. Freehold Racing Ass'n, D.N.J.1966, 53 CCH Lab.Cas. ¶31,786.

[6] The Tenth Circuit has stated that the exemption's purpose is "to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the Fair Labor Standards Act." Brennan v. Yellowstone Park Lines, 10th Cir. 1973, 478 F.2d 285, 288. While that appears to be a logical theory, we can find nothing in the legislative history to confirm it. The legislative history simply does not directly address the purpose of the amusement-recreation exemption.

tion first appeared in a 1961 amendment to the FLSA that also exempted hotels, motels, restaurants, and movie theaters.[7] None of those activities principally engage in the sale of goods. They provide meals and services; they sell the temporary use of their premises. Another indication is a House of Representatives committee report which listed as exempt activities "... amusement parks, carnivals, circuses, sports events, parimutuel racing, sport boating or fishing. . . ."[8] None of those activities' sole or primary function is the sale of recreational goods. In a like vein is Senator Yarborough's view that the exemption was meant to apply only to amusement parks.[9]

Subdivision (2) of section 213 reinforces the legislative history's suggestion that establishments selling goods do not qualify for an amusement-recreation exemption. It specifically provides a separate exemption for retail establishments whose annual sales of goods fall below $250,000. 29 U.S.C.A. §213(a)(2) (Supp. 1973).

Further support can be found in the Wage and Hour

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[7]. Act of May 5, 1961, Pub.L.No. 87-30, §9(a)(2)(ii), 75 Stat. 71.

[8] H.R.Rep.No.871, 89th Cong., 1st Sess. 35 (1965). The report discussed H.R. 10518, a proposed amendment to the Fair Labor Standards Act which Congress did not pass. While H.R. 10518 was not passed, the committee's examples of exempt amusement activities are relevant because the following year Congress enacted into law an FLSA amendment whose amusement-recreation exemption is quite similar to that in H.R. 10518. *Compare* 29 U.S.C.A. §213(a)(3) (Supp. 1973) *with* H.R.Rep.No.871, 89th Cong., 1st Sess. 35 (1965).

[9] 112 Cong.Rec. 20,594, 20,791 (1966). Senator Yarborough was Senate floor manager of the 1966 amendments to the FLSA.

Administrator's various interpretations of the amusement-recreation exemption. Among the activities which the Administrator believes to be eligible for the exemption are golf courses,[10] amusement parks, baseball parks, racetracks, dogtracks,[11] and summer camps.[12] All of these establishments provide recreational facilities on a temporary basis; none have the sole or primary function of selling goods.

[3] To be sure, in some instances the Administrator has approved amusement-recreation exemptions for enterprises that solely or primarily sell goods. Examples are pro shops at golf courses[13] and dry goods stores in national parks.[14] In each instance, though, the exempted

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[10] Wage-Hour Op. Letter No. 600 (May 25, 1967), CCH Lab.L.Rep. ¶30,589 [Transfer binder, Nov. 1966-Mar. 1969].

[11] Wage-Hour Op. Letter No. 623 (June 22, 1967), CCH Lab.L.Rep. ¶30,612 [Transfer binder, Nov. 1966-Mar. 1969].

[12] Wage-Hour Op. Letter No. 903 (June 10, 1968), CCH Lab.L.Rep. ¶30,914 [Transfer binder, Nov. 1966-Mar. 1969].

[13] Wage-Hour Op. Letter No. 648 (August 9, 1967), CCH Lab.L.Rep. ¶30,639 [Transfer binder, Nov. 1966-Mar. 1969].

[14] Wage-Hour Op. Letter No. 632 (July 5, 1967), CCH Lab.L.Rep. ¶30,622 [Transfer binder, Nov. 1966-Mar. 1969].

In Wage-Hour Op. Letter No. 1170 (April 9, 1971), CCH Lab.L.Rep. ¶30,740 [Transfer binder, Mar. 1969-June 1973], the Administrator approved an amusement-recreation exemption for a combination souvenir stand-bus service at a Civil War battlefield. The opinion letter does not state, however, whether souvenior selling was the establishment's principal activity.

enterprise has been an integral part[15] of a supervised, geographically delimited recreational area or "establishment." By contrast the Gulf of Mexico is under no one's ownership, management or supervision, and no one can seriously argue that the Gulf, like a national park, has been set aside for recreational use. To accept appellee's argument that its marina is an integral part of the Gulf, and that the Gulf is a recreational area, would be to exempt every seaside merchant in the country and permit an exemption to swallow the FLSA. Mere proximity to a body of water is insufficient to make a retail store a recreational establishment.

IV.

Section 213(a)(3) exempts amusements or recreational *establishments*. Since the marina is not an integral part of a larger establishment, or of a supervised, geographically delimited recreational area, the "establishment" is the marina itself. Our task is to decide whether it can be characterized as "amusement or recreational" in nature.

Characterizing the marina is made difficult by the variegated nature of the goods sold and services performed on its premises. The marina sells products ranging from expensive marine hardware to cheap convenience items, and performs a variety of boat mainte-

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[15] The pro shops and attached golf courses had a common owner. Wage-Hour Op. Letter No. 648, *supra*. The dry goods stores had an exclusive contract with the National Park Service, which limited their merchandise. Wage-Hour Op. Letter No. 632, *supra*. Thus the sales activity was in a contractual or subordinate relationship with the recreational area's owner; the relationship contained something more than mere physical proximity to a recreational area.

nance services. While it may be somewhat artificial to apply one label to such a varied mixture of activities, the Act requires that we must. After all, our task is to decide whether the amusement-recreation tag should be applied to appellee's marina.

[4, 5] Since the marina's activities are multifaceted, we have concluded that its principal activity should be determinative of the marina's eligibility for an exemption.[16] To determine the nature of the marina's principal activity we shall apply an income test. The marina's major income source will be its principal activity. Appellee objects to that test, saying that the relatively high price of boats and motors compared to bait, groceries, and boat rentals will distort our picture of the marina's true character. We note, however, that other sections of the FLSA have long relied on dollar measurements; section 203, for example, uses dollars to determine if one is engaged in commerce.[17] And since the test is easy to apply, employers will be able to predict whether they can qualify for the amusement-recreation exemption.

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[16] Representative Dent, House floor manager of the 1966 FLSA amendments, suggested the "principal activity" test in response to the question whether a resort hotel could earn an amusement-recreation exemption. He said the hotel's eligibility for such an exemption would depend on whether recreation was the principal activity in that geographical area. 112 Cong.Rec. 11,366 (1966).

[17] 29 U.S.C.A. §203(s) (Supp. 1973), amending 29 U.S.C.A. §203(s) (1964). In addition, the FLSA uses monetary tests to determine whether a business is small enough to qualify for a retail-service establishment exemption, or whether it is seasonal enough to qualify for the amusement-recreation exemption. 29 U.S.C.A. §§213(a)(2) and 213(a)(3) (Supp. 1973).

In this case, the marina derived fifty-seven percent of its income from boat, motor, and trailer sales.[18] Thus the income test shows that the marina's principal activity is selling expensive recreational hardware. Therefore we conclude the marina is ineligible for exemption as an amusement or recreational establishment.

We believe our refusal to grant appellee an exemption produces an equitable result. If one's principal business is selling expensive equipment, he has no unusual need for cheap labor. To appreciate this point one need only contrast a sporting goods store with a baseball park and its army of ushers, ticket takers, maintenance workers, and food vendors.

To summarize, we conclude that appellee's marina is principally engaged in selling boats, motors and trailers. The language, legislative history, and previous administrative interpretations of the FLSA all indicate that such an activity was not intended to be exempt under the rubric of amusement and recreation. Therefore we reverse the decision below and remand for the trial court to issue an appropriate injunction and award back pay for the year 1970.

Reversed and remanded.

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[18] *See* Note 3, *supra.*

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION
No. 72-G-22

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

TEXAS CITY DIKE & MARINA, INC.
Defendant.

MEMORANDUM AND ORDER

The Secretary of Labor, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq., seeks to enjoin defendant from violating the minimum wage, overtime, child labor and record keeping provisions of the Act.

The parties have negotiated a settlement of the claim except for one issue remaining for the Court's determi-

nation. Defendant admits employing minors in an occupation determined by Department Regulations to be hazardous and has ceased this violation. Plaintiff agrees that defendant has kept proper records at all times.

The unresolved issue is whether defendant's employees were covered by the minimum wage and overtime provisions during 1970. Defendant contends they were exempted from coverage by Section 13(a)(3) of the Act, 29 U.S.C. 213(a)(3). Defendant admits to owing $4,089.61 in back wages for 1971 and is ready to pay that amount. If its employees were covered in 1970, defendant owes an additional $4,668.72 to be distributed among particular employees in specified amounts.

Section 13(a)(3) provides that the minimum wage and maximum hour provisions will not apply with respect to:

> ...any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-⅓ per centum of its average receipts for the other six months of such year.

This provision was added to to the statute in 1966. Only one reported case has construed the exemption. *Wirtz v. Freehold Racing Assn.*, 53 CCH Lab. Cases para. 31,786 (D. N.J. 1966). The Administrator, Wage, House and Public Contracts Division of the Department of Labor has not issued any regulations or interpretative bulletins on this provision. Only a few advisory opinions of the Administrator have dealt with it. Those opinions have approved the exemption for golf courses,

swimming pools, summer camps, food and souvenir vendors, and national parks establishments. The Administrator has held the exemption inapplicable to private clubs, convention employees, and janitorial services at race tracks. Other than these merely advisory opinions, the Court has little guidance in determining defendant's claim to an exemption. The general rule, of course, is that statutory coverage is to be favored and exemptions are to be narrowly construed against the employer. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 592 (1959); *Wirtz v. Jernigan*, 405 F.2d 155 (5th Cir. 1968).

Plaintiff admits defendant meets the seasonal requirement that average monthly receipts of six months be not more than 33-⅓ per centum of the average receipts for the other six months. Plaintiff contends nonetheless that the defendant was not an amusement or recreational establishment as contemplated by the exemption.

Defendant operated a marina, providing boating services to the general public. These included storage, repair and maintenance of customers' boats; boat and motor rentals; sale of bait and groceries; dock facilities; and, boat lifts. Defendant also sold recreational boats, but no back wages are sought for any employee engaged in this activity.

Having reviewed the arguments and authorities presented by counsel for both sides, the Court concludes that in 1970, defendant's employees were exempt from the Act's coverage by Section 13(a)(3). Defendant is not liable for the additional wages.

The common usage of the term "recreation" supports this result. Defendant caters solely to "weekend" boat-

ers and fishermen. The business is very similar to the business establishments within national parks. Opinion Letter, Wage-Hour Administrator No. 1170, 2 CCH Wages-Hours para. 30,740 (April 9, 1971). The goods and services provided are used for recreational purposes, like those of a pro shop at a golf course. Opinion Letter, Wage-Hour Administrator No. 648, 2 CCH Wages-Hours para. 30,639 (August 9, 1967). Certainly, any layman would categorize defendant's business as a recreational enterprise.

The seasonal nature of defendant's business is further evidence of its recreational character. The business is not oriented toward shrimpers and commercial vessels which are active all year long. It is dependant upon pleasure boaters, with a high concentration of business in the summer. The exemption is obviously aimed at businesses involving seasonal sports or amusements whose needs for employees fluctuate with the seasons. Defendant falls into this category along with racetracks and summer camps. Opinion Letter, Wage-Hour Administrator No. 903, 2 CCH Wages-Hours para. 30,914 (June 10, 1968).

Plaintiff, Secretary of Labor, suggests several distinctions between defendant and other recreational establishments. These distinctions are neither found within the statute nor required by logic. The fact that boats which are bought, stored, or repaired at the defendant's business are not enjoyed entirely within the geographical confines of the business bears little relation to defendant's recreational character. In this regard, also, defendant is analogous to a golf pro shop or an amusement park concession stand. Similarly the contention that defendant is not intimately related to a

larger amusement establishment is not persuasive. The statute implies no such requirement.

At the time in question, defendant was actively engaged in recreational services on a seasonal basis and thereby qualifies for the statutory exemption.

Within ten (10) days, defendant shall submit a final judgment consistent with this decision and embodying the parties' agreements on the other issues, approved by plaintiff as to form.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

The Clerk shall file this Memorandum and Order and send a copy to all counsel.

DONE at Houston, Texas, this 7th day of February, 1973.

JAMES NOEL
Judge

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, CLERK

By: EMMA LOUISE YON
Deputy Clerk

APPENDIX C

Wage-Hour Opinion Letters

OPINION LETTER NO. 600, MAY 25, 1967

Your letter of February 27, 1967, has been referred to this office for reply. We will respond to your questions in the same order in which you set them out in your letter.

(1) *Registered nurses employed at Hospital.*—The Fair Labor Standards Act provides, in section 13(a) (1) a complete exemption from its monetary requirements for employees "employed in a bona fide executive, administrative, or professional capacity . . ." The enclosed Regulations, Part 541, discusses this exemption in detail. Registered nurses can qualify as professional, executive, or administrative employees provided they meet the tests of these exemptions, including the salary test. They may, in some cases, perform duties which can qualify for exemption only by recognizing a combination of professional work with executive or administrative work. In such a situation in order for the nurse to meet the conditions for exemption, the stricter requirements of the professional exemption must be met, that is, a salary of $115 a week and the 20 percent limitation on nonexempt work.

(2) *Research assistants.*—The status of graduate students in colleges and universities is under consideration. Graduate students perform work, usually of a type that would be considered professional, in the course of obtaining advanced degrees. In some cases the WHPC Divisions would not assert that there is an employment relationship under the act. In those

cases where there may be such a relationship, the Divisions, in cooperation with the American Council on Education is endeavoring to arrive at an equitable solution to this problem.

(3) *Student union barber shop.*—If the student union barber shop is, as you say, a separate and distinct physical place of business which invites the patronage of the public at large and if it has an annual dollar volume of sales of less than $250,000, exclusive of excise taxes at the retail level which are separately stated, and otherwise meets the tests of section 13(a)(2) of the act its employees would be exempt from the monetary provisions of the act.

(4) *Agency funds.*—There is insufficient information to determine whether the people paid from these funds would be considered to be employees of the university enterprise.

(5) *House counselors in women's dormitories.*—It does not appear that these employees would meet the requirements for exemption under Regulations, Part 541. However, all of their time on the premises need not be counted as hours worked. An employee who resides on his employer's premises on a permanent basis or for extended periods of time, such as a dormitory house mother, is not considered as working all the time while on the premises. Ordinarily, the employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when the employee may leave the premises for personal purposes. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable

agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

(6) *Chapel choir.*—Although there are insufficient facts to make a definite determination, the payment of cash remuneration for this service would appear to establish an employment relationship. However, it is apparent that the amount paid is sufficient to meet the current minimum wage requirement.

(7) *Divinity School choir members.*—No opinion can be given on this situation without additional information.

(8) *Golf course employees.*—A golf course, if operated as a separate establishment open to the public, may qualify for exemption as a retail or service establishment. Also the new exemption in section 13(a)(3) may be applicable, under the conditions set forth therein, to a golf course which invites the patronage of the public. Your question regarding the "guaranteed 60-hour wage", which we assume relates to the application of section 7(f) of the act, cannot be answered without more information than your letter provides. However, you may be able to determine whether this provision is applicable by a consideration of the principles stated in sections 778.402-778.414 of the enclosed Interpretative Bulletin on Overtime Compensation.

(9) *Salary rate.*—To be exempt as a professional employee under Regulations, Part 541, employees must be compensated on a salary or fee basis at a rate of not less than $115 per week (except for specific professions set out in the regulations). Discussion of the salary basis of pay is found in sections 541.117 and

541.118 of the regulations. The phrase "at a rate of", as applied to a salary, is used with reference to salaries based on a period longer than a week. Its application to payments on a fee basis is discussed in section 541.313 of the regulations. However, in the case of part-time employment on a salary, there would be compliance with the act if the salary is sufficient to yield at least the minimum wage for each hour worked in the workweek, so long as the employee does not work in excess of statutory workweek applicable to him.

Wage-Hour Opinion Letters

OPINION LETTER NO. 623, JUNE 22, 1967

This is in reply to your letter concerning the application of the exemption from the minimum wage and overtime pay requirements provided in section 13(a)(3) of the Fair Labor Standards Act as it was amended in 1966. We shall answer your questions in the order in which you presented them.

The exemption provided in section 13(a)(3) of the Act depends upon the character of the establishment by which the employee is employed. Food and souvenir vendors employed by an establishment such as an amusement park, baseball park, racetrack or dogtrack may qualify for exemption from the minimum wage and overtime pay provisions under section 13(a)(3) of the amended Act if the establishment they are employed by meets the requirements of (A) or (B) of this section. The exemption provided under this section will apply to the employees of such establishments. It will also apply to food and souvenir vendors employed by a concessionaire operating on the premises of such an establishment provided the operations of the concessionaire and the host establishment constitute a single establishment which meets the requirements for the exemption.

Two or more business activities operated integrally on the same premises usually will be considered a single establishment within the meaning of the Act. Sections 779.23 and 779.303-779.305 of the Interpretative Bulletin, Part 779 discuss the meaning of "establishment". As explained in the bulletin, it is only in rare instances

that two or more business activities on the same premises are characterized by the physical and functional separation requisite to constitute more than one establishment for the purpose of the exemptions. In such instances the exemption will apply to the employees of each establishment which separately meets the requirements of section 13(a)(3).

The principles discussed above also apply in determining whether county and State fair employees, employees of larger expositions, and employees of concessionaires operating on the premises of such establishments are exempt under section 13(a)(3) of the Act. However, the exemption provided under section 13(a)(3) does not apply to employees who are employed by the concessionaire's central establishment such as a commissary and offices which are not on the premises of an amusement or recreational establishment. Employees at a convention (including those employed by a concessionaire) are not within the scope of the exemption provided by section 13(a)(3) as a convention is not an amusement or recreational establishment. Section 13(a)(3) of the amended Act does not require that the amusement or recreational establishment be a retail or service establishment as was required under section 13(a)(2)(ii) of the prior Act.

Under section 13(a)(3)(B) the language of the statute refers to "average receipts for any six months of such year" in referring to the preceding calendar year as the basis for determining the applicability of the exemption. Thus, the monthly average based on total receipts for the six individual months (not necessarily consecutive months) in which the receipts

were the smallest should be compared with the monthly average for the six individual months when the receipts were the largest to determine whether the test under this part is met.

Wage-Hour Opinion Letters

OPINION LETTER NO. 632, JULY 5, 1967

This is in further reference to your letter concerning the application of the exemption provided in section 13(a)(3) of the Fair Labor Standards Act.

Establishments such as those selling groceries, curios, and dry goods, as well as gas stations, hotels, motels, restaurants and the like, are generally not within the categories of establishments commonly recognized as inherently of an amusement or recreational character. Therefore, they will not be considered for exemption under section 13(a)(3) of the Act. However, sections 13(a)(2) and 13(b)(8) will apply to the appropriate establishment which meets the tests of those exemptions.

However, the above named establishments in national parks are limited by policy of the Interior Department to merchandise only those items and to provide only those services appropriate for public use and enjoyment of areas administered by the National Park Service. Where the establishments operate under an exclusive contract with the National Park Service and only when the park is open to the public, the activities of these establishments are considered to have a sufficiently intimate relationship to the operation of the national parks as recreational areas to warrant their characterization as "amusement or recreational" establishments for purposes of section 13(a)(3) of the Act.

Accordingly, such establishments will be considered amusement or recreational establishments and, if they meet the seasonality tests of section 13(a)(3), any

employee employed by such an establishment in a national park will be within the exemption so long as he does not, during his workweek, perform other nonexempt work to which the act applies. An employee to be exempt must be employed by the exempt establishment. Employment by an organization operating more than one such establishment, as in the case of employees performing central office or central warehouse functions which serve more than one establishment, is not within the exemption.

Of course, golf courses or swimming pools open to the public and operated as separate establishments (see sections 779.303 through 779.305 of the enclosed bulletin) may qualify for the section 13(a)(3) exemption under the tests of that section.

OPINION LETTER NO. 645, AUGUST 9, 1967

This is in further reference to your letter, concerning the application of the Fair Labor Standards Act, as amended in 1966 to your client's business consisting of four golf courses, including attached pro-shops, restaurants and bar facilities, which are operated at different locations.

From the facts presented in your letter it would appear that each golf course, including its attached facilities, constitutes a single establishment. Employees of some golf course establishments were not subject to the monetary requirements of the Act prior to February 1, 1967, due to a specific exemption provided for certain amusement or recreational establishments operated on a seasonal basis.

The 1966 amendments modified this exemption by providing in section 13(a)(3) of the Act the specific conditions for exemption from the minimum wage and overtime pay requirements of the law for any employee employed by an amusement or recreational establishment. On the basis of the information furnished in your letter it appears that each of your golf course establishments would qualify for exemption from the monetary provisions of the law under section 13(a)(3)(B) of the Act as amended.

However, employees employed in a central office or warehouse rather than by a particular establishment, performing central functions serving all four golf course establishments would not be exempt from the mini-

mum wage and overtime pay provisions of the Act under section 13(a)(3). The four golf course establishments constitute a single enterprise, as defined in section 3(r), which is covered both under the Act prior to the amendments (see page 3 of the Handy Reference Guide), and under section 3(s)(1) of the Act as amended in 1966. Therefore, employees engaged in central functions of the enterprise must be paid in accordance with the basic wage and hour standards for previously covered employment provided in sections 6(a) and 7(a)(1) of the Act, and listed on page 1 of the guide, if not otherwise exempt.

Wage-Hour Opinion Letters

OPINION LETTER NO. 903, JUNE 10, 1968

This is in further reply to your letter concerning the application of the Fair Labor Standards Act to your clients who operate summer camps for boys and girls.

The Act applies to employees engaged in or producing goods for interstate commerce and to employees in certain enterprises, as discussed on pages 2 through 4 of the Handy Reference Guide.

Although it is not clear from your letter whether any of the employees of these summer camps are covered by the Act, please note that even though coverage may exist, section 13(a)(3) provides an exemption from its minimum wage and overtime pay provisions for certain amusement or recreational establishments. If such an establishment does not operate more than seven months in any calendar year or if during the preceding calendar year its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, the exemption would apply.

Since your clients' summer camps are operated for a maximum of 12 weeks during the summer it would appear that they may qualify for exemption under section 13(a)(3)(A).

Wage-Hour Opinion Letters

OPINION LETTER NO. 983, APRIL 23, 1969

This is in further reply to your letter concerning the application of the Fair Labor Standards Act to your client, the Country Club.

The information obtained during the course of the investigation and subsequent negotiations about your client's operations is as follows:

(1) It is a private membership club open only to members and their guests.

(2) It has two types of memberships, class "A" having an initiation fee of $500 and yearly dues of $450 and a social membership requiring $300 as an initiation fee and yearly dues of $265.

(3) Class "A" members are entitled to all facilities of the club and social members are entitled to all facilities except golf.

(4) Applications for membership must be submitted on an approved application form and signed by two members in good standing as sponsors and posted in the club house for at least 10 days before acceptance by the Board of Governors.

This information, together with an examination of the club's by-laws, clearly shows that the club is not open to the general public. In addition, the club's printed literature shows a typical social club.

You cite the cases of *Clover Hill Swimming Club v. Goldboro* and *Commonwealth v. Brown* to support the theory that the club's facilities are "public accommodations". Those cases involved civil rights laws which were intended to protect the rights of Negro citizens

who were being denied public facilities because of their race. We do not consider those cases concerning what is a "public accommodation" under civil rights acts to be relevant or decisive to a decision as to what is "a retail or service establishment" under the Fair Labor Standards Act. Interpretations of different statutory language in other statutes are not controlling in interpreting the Fair Labor Standards Act. Furthermore, in the *Clover Hill* case, which was the basis of the Brown decision, it is evident that the court considered that the so-called private club involved was not in fact "private" and that it believed the proprietors were using the claim of being a private club as a facade to conceal racial discrimination.

For these reasons it is the position of the WHPC Divisions that the club does not qualify as a retail or service establishment and its swimming, tennis, and golfing facilities do not qualify for exemption as amusement or recreational establishments under section 13(a)(3) of the Act. We have taken the position that this exemption cannot be utilized by private clubs. The legislative history makes it clear that the exemption was intended for the typical amusement or recreational establishments which is frequented by the public for its amusement. Furthermore, these facilities are merely parts of the club and not separate and distinct places of business operating independently of an establishment which is open the entire year.

As we advised you in the material sent to you in our previous letter, the WHPC Divisions have not questioned the application of the section 13(b)(8) exemption for employees engaged in the restaurant operations of country clubs.

Wage-Hour Opinion Letters

OPINION LETTER NO. 1055, FEBRUARY 25, 1970

This is in further reply to your letter and pursuant to your earlier discussion with members of my staff, concerning the application of the Fair Labor Standards Act to [your organization]. The Association is a nonprofit corporation . . .

The enterprise basis of coverage added to the Act in 1961 brought within its provisions all employees of establishments having some employees engaged in interstate commerce or in producing goods for interstate commerce if the enterprise grossed $1,000,000 or more annually. However, this provision was not considered to extend the coverage of the Act to employees not individually covered who were employed in eleemosynary, religious, educational, or similar activities of organizations operated on a nonprofit basis.

In addition, although the 1966 amendments redefined a covered enterprise to include certain institutions (whether public or private or operated for profit or not for profit) which had previously not been considered enterprises to which the Act applied, an organization such as the one in question] would continue to be considered outside the act's enterprise provisions. Therefore, as pointed out to you during your discussion with members of my staff, coverage of the Fair Labor Standards Act would apply only to individual employees who may be engaged in interstate commerce or in the production of goods for interstate commerce. Such individually covered employees need not, however, be paid according to the minimum wage and

overtime pay requirements of the act as long as the exemption discussed below remains applicable to the Association.

It is the position of the Wage and Hour and Public Contracts Divisions that [the organization], as operated by the Association, would qualify for the complete minimum wage and overtime pay exemption under section 13(a) (3) (B) of the Fair Labor Standards Act. It is typical of the establishments which are open to and frequented by the general public for their amusement and recreation. The information you have provided also indicates that the receipts during the representative six months (first and fourth quarters) for the calendar year 1969 represents 27.27 percent of the receipts during the second and third quarters of 1969, thus meeting the requirement for exemption that ". . . during the preceeding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year." It would be advisable, however, for you to recheck these percentages each year in order that continued application of the exemption be verified.

OPINION LETTER NO. 1102, JULY 21, 1970

This is in reply to your letter in which you ask if a company's seasonal operations within a single national park may be considered collectively to be an "establishment" so that its employees who perform central office or central warehousing functions solely for the various facilities within the park may be considered exempt under section 13(a)(3) of the Fair Labor Standards Act.

Section 13(a)(3) of the Act provides a complete minimum wage and overtime pay exemption for any employee employed by an *establishment* which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year.

As used in the Act, the term "establishment" refers to a "distinct physical place of business" rather than to an "entire business or enterprise" which may include several separate places of business. Consequently, the 13(a)(3) exemption which applies to "employees employed by an establishment which is an amusement or recreational establishment . . ." cannot be so interpreted to include those employees, such as the central office

and central warehouse employees you have in mind, who are not employed by a distinct separate place of business of the type contemplated by section 13(a)(3) of the Act. Therefore, employees employed solely to service establishments located in a single national park or in several national parks are not within the scope of the 13(a)(3) exemption.

Wage-Hour Opinion Letters

OPINION LETTER NO. 1170, APRIL 9, 1971

This is in further reply to your letter concerning the application of the Fair Labor Standards Act to the souvenir selling business and proposed bus tour operations of a client of your firm.

Your client is engaged in operating a souvenir stand on a Civil War battlefield. He sells souvenirs, maps, refreshments, books and other merchandise to tourists who visit the battlefield. The business is presently considred to be within the retail or service establishment exemption from the Act's minimum wage and overtime pay provisions as the firm's sales do not exceed $250,000 a year. He is proposing to expand his business by building a terminal to house his souvenir operations and to act as a terminal for a bus tour service. The tour service will be supervised by the National Park Service, although your client does not have a contract with the Service.

It is our opinion that the terminal with all its facilities including the bus tour service is typical of establishments open to and frequented by the general public for amusement and recreational purposes. It would qualify for the exemption contained in section 13(a)(3)(B) of the Act as an establishment which is an amusement or recreational establishment if its average receipts for any six months of the preceding calendar year are not more than 33⅓ of its average receipts for the other six months of the calendar year.

This opinion is of course predicted on the information contained in your letter. If for any reason the operations of your client may change in any manner this may alter the exemption status of his business.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1988

TEXAS CITY DIKE & MARINA, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's judgment that petitioner's business, which derived 57 percent of its income from the sale of boats, motors and trailers, was an "amusement or recreational establishment" within the exemption from the minimum wage and maximum hours provisions of the Fair Labor Standards Act.

This action was brought by the Secretary of Labor to enjoin petitioner from violating the Act's minimum wage, overtime, child labor and recordkeeping requirements and to require payment of back wages under the Act. Petitioner operates an establishment in Texas City, Texas, in which it sells boats, motors, and trailers, it repairs, stores, and rents boats and it provides dock facilities, motor fuel, and related services (Pet. App. A, p. 2a). In 1970, the year in question, the sale of boats, motors,

and trailers accounted for 57 percent of the establishment's income from all sources (*ibid.*). Together with the income from parts sold in the repair of boats, motors, and trailers, such sales accounted for 68 percent of all sources of income (*ibid.*).

It was stipulated that petitioner had not complied with the minimum wage and maximum hours requirements of the Act in 1970 and 1971, and the only issue is whether petitioner was subject to the Act in 1970. The district court ruled that in 1970 petitioner's business was exempt from the wage standards of the Act as an "amusement or recreational establishment" under the provisions of Section 13(a)(3) of the Act. The court of appeals reversed on the ground that the principal activity of the business was the sale of boats, motors, and trailers, and that it was therefore not an "amusement or recreational establishment" (Pet. App. A, pp. 9a-10a).

1. Since the petitioner's establishment was engaged in a "varied mixture of activities" (Pet. App. A, p. 9a), some of which could be thought to be "amusement or recreational" and others not, it was necessary for the court of appeals to determine petitioner's exemption status on the basis of its principal activity. The legislative history of the exemption specifically indicates that the "principal" or "primary" activity of an establishment was intended to be determinative. 112 Cong. Rec. 11366-11367.

The court of appeals correctly held the establishment's principal activity to be the sale of boats, motors, and trailers (Pet. App. A, p. 10a), since that activity alone accounted for more than all the other operations taken together. Dollar volume is an appropriate criterion for assessing the relative significance of the components of a commercial enterprise, and is used by the Act in anal-

ogous contexts such as qualification for the retail exemption in Section 13(a)(2), 29 U.S.C. 213(a)(2), and for enterprise coverage in Section 3(s), 29 U.S.C. 203(s). Petitioner has at no time suggested data based on other possible criteria that would lead to a different result in determining its principal activity. Such data, if they existed, were peculiarly available to petitioner, who, as claimant of a special exemption, has the affirmative burden of showing that it is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; see *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. It adduced no such data, however, and submitted the issue on the basis of an agreed stipulation of facts including data for income only (Pet. App. A, p. 2a, n. 3).[1]

In view of the character of its principal activity, petitioner's business was properly held not to be an "amusement or recreational establishment." The express purpose of Section 13(a)(3) was to exempt "such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sports events parimutuel racing, sport boating or fishing, and other similar or related activities * * * ." H. Rep. No. 871, 89th Cong., 1st Sess., p. 35. The sale of boats, motors and trailers no more constitutes operation of "amusement parks" and "carnivals" than does the sale of Ferris wheels, carousels, or pinball machines. The sale of expensive mechanical and structural equipment is a distribution activity, not a recreational activity; and, as the court of appeals noted, because it is not a labor-intensive business, as are amusement parks and carnivals, it does not have the same need for cheap

[1]Petitioner contends that the "sales test" adopted by the court is unfair and is inconsistent with the seasonality test established by the Act, which applies to receipts during the preceding calendar

labor (Pet. App. A, p. 10a). The decision below, moreover, is consistent with the settled rule that the exemptions of the Act "are to be narrowly construed." *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295.[2]

2. Petitioner's claim that as a matter of due process the sales test adopted by the court in construing Section 13(a)(3) could only have been imposed through rule-making is without merit. Cf. *National Labor Relations Board* v. *Bell Aerospace Co.*, No. 72-1598, decided April 23, 1974, slip op. pp. 23-28; *id.*, slip op. p. 1 (White, J., concurring in part).

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year (29 U.S.C. 213(a)(3)) rather than the year for which liability is being asserted. However, since petitioner submitted, in support of its claim of exemption, data on receipts for the current year, but not the preceding year, the court of appeals had little choice but to rely on current data and could reasonably assume that it was representative.

[2]Petitioner's reliance upon *Commissioner* v. *Duberstein*, 363 U.S. 278, as support for the contention that the court of appeals erred in not applying the "clearly erroneous" rule (Pet. 11-13), is misplaced. The Court in *Duberstein* carefully limited its decision to the question before it, whether particular property transferred to a taxpayer was a "gift" within the meaning of a particular provision of the Internal Revenue Code excluding gifts from gross income. The Court held that, in view of "[t]he nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, * * * primary weight in this area must be given to the conclusions of the trier of fact" (363 U.S. at 289), whose findings must stand unless "clearly erroneous." *Id.* at 291. This conclusion, said the Court, was "implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried." *Id.* at 290. Since these factors are not present here, the rationale of *Duberstein* is inapplicable.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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